

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

ORIGINAL

76-7195

United States Court of Appeals
For the Second Circuit

DIMITRIOS GARIS,
Plaintiff-Appellant,

v.

COMPANIA MARITIMA SAN BASILIO, S.A.,
Defendant-Appellee.

*On Appeal From The United States District Court
For The Southern District Of New York*

Appellant's Brief

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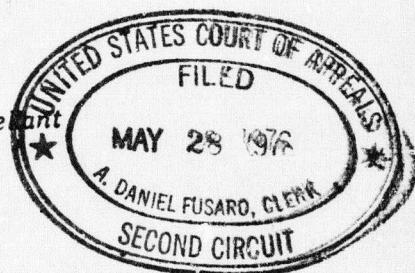


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

DIMITRIOS GARIS,

Plaintiff-Appellant,

PLAINTIFF-APPELLANT'S
BRIEF

- against -

COMPANIA MARITIMA SAN BASILIO, S.A.,

Defendant-Appellee.

-----X

S T A T E M E N T

This is an appeal from the order of Judge THOMAS P. GRIESA dated the 12th day of March, 1976 (81a)* granting defendant's motion for summary judgment dismissing the plaintiff's complaint on the grounds of res judicata, by reason of a previous decision of Judge EDWARD C. MC LEAN declining jurisdiction pursuant to the doctrine of forum non conveniens.

Plaintiff appeals on the grounds that the doctrine of res judicata is not applicable because:

1. The first dismissal was neither "final" nor "on the merits" as defined by the requirements of that doctrine;
2. That pursuant to the doctrine of U.S. v. Costello, 365 U.S. 265, and Federal Rules

* References are to the Appendix unless otherwise stated.

of Civil Procedure 41(b) the dismissal herein is not such as to bar a new and proper action;

3. The decision of Judge Mc LEAN determining a collateral matter of fact relating to jurisdiction is not res judicata in the presence of new factual material.

THE FACTS

This is an action by the plaintiff, DIMITRIOS GARIS, for personal injuries sustained when a steam carrying pipe in the engine room of the vessel on which he was working, the Greek flag EURYTAN opened and scalded him over an area of 70% of his person and rendered him totally disabled for life (20a).

That jurisdiction is asserted pursuant to the Jones Act, applicable to the Greek flag vessel herein and the defendant Panamanian corporation, by virtue of the contacts of this transaction with the United States (20a, 1 TENTH). The within action was instituted in this court by the filing of the complaint and the issuance of process on December 17, 1974.

No question of jurisdiction over the person or subject matter of the instant case is present. The sole

question present is whether on this record a decision of Judge Mc LEAN reported at 261 F.Supp. 917, and affirmed at 386 F.2d 155 is res judicata of the present action.

Relevant to the legal issues hereinafter to be discussed are the following. In the presence of sufficient contacts between the defendant's vessel and the United States, United States law as represented by the Jones Act is required to be applied, and, the jurisdiction of the Court is mandatory and may not be declined pursuant to the doctrine of forum non conveniens - Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 and Moncada v. Lemuria Shipping Company, 491 F.2d 470 (Ca.2). The discretionary declination by Judge Mc LEAN and its affirmance by the Court of Appeals was therefore a determination that the plaintiff (represented by other counsel) had failed to present, in opposition to the motion to decline, facts sufficient to invoke the mandatory jurisdiction of the court.

NEW MATERIAL

Judge GRIESA did not pass upon whether the new material, not submitted to Judge Mc LEAN, was sufficient for the purpose of invoking the mandatory jurisdiction of the Jones Act if

properly before the court, or for that matter to compel the court to retain jurisdiction of the claim, even if it were not a Jones Act case but a general Maritime Law case. This material is contained in the bound volume of exhibits (incorporated by reference in the opposing affidavit. See Exhibits 2 - 16 and 19 and 20).

See also Appendix pages 32a through 61a and Exhibit 17 proving that a Greek court will not entertain plaintiff's Congressionally created remedy pursuant to the Jones Act or the alternative general Maritime Law remedy that is granted in the presence of sufficient contacts.

POINT I

THE DECISION HEREIN IS CONTRARY TO THE LAW THAT RES JUDICATA REQUIRES BOTH A DETERMINATION "ON THE MERITS" AND "FINAL" NEITHER OF WHICH ARE PRESENT AND CONTRARY TO FEDERAL RULE OF CIVIL PROCEDURE 41(b).

The Restatement on the Law of Judgments §49 states:

"a. Judgment not on the merits. A judgment for the defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment determines that the plaintiff has no cause of action, it is not on the merits; but if it determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits. If the defendant, whether on demurrer, motion, verdict or otherwise,

"obtains judgment in his favor on a ground not involving the substance of plaintiff's cause of action, the cause of action is not extinguished thereby."

In Costello v. United States, 365 U.S. 265, the Supreme Court in definition of the term "merits" stated at page 285:

"A common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In Haldeman v. United States, 91 U.S. 584, 585, 586, 23 L.Ed. 433, 434, which concerned a voluntary non-suit this court said, 'there must be at least one decision on a right between the parties before there can be said to be a determination of the controversy, and before a judgment can avail as a bar to a subsequent suit . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively'."*

Certainly no decision of any "right" to assert a claim pursuant to the Jones Act or the general Maritime Law was determined by the decision to decline jurisdiction.

There is no dispute that, both the decision of the lower court and the affirmance thereof claimed to be a bar, were both declinations of jurisdiction, Garis v. Compania Maritima, 261 F.Supp. 917, 919, aff'd 386 F.2d 155, 157.

* To the same effect that a plaintiff is entitled to one opportunity to establish the substantive merits of his claim. See Saylor v. Lindsley, 391 F.2d 965, 969 (Ca.2); Etten v. Lovell Mfg., 225 F.2d 844, 846 (Ca.3).

But a declination of jurisdiction is expressly not a determination of any merits, but on the contrary is a refusal, in the exercise of a presumed discretion, to reach any merits.

On the present motion claiming res judicata, Judge GRIESA, treated the previous application to Judge Mc LEAN as one addressed to the court's jurisdiction. As such, Federal Rule of Civil Procedure 41(b) would require the denial of the motion rather than its granting. Rule 41 (b) in relevant part states:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision [involuntary dismissal] and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits." [Emphasis added.]

Clearly the findings required pursuant to Rule 52(a) for a judgment on the merits was not made, but more important a forum non conveniens dismissal implies a refusal to consider the merits. Furthermore, a forum non conveniens dismissal partakes of a determination that the venue is improper, and that the action may better be prosecuted elsewhere.*

* Not only is the Southern District of New York the only court in which the Jones Act claim may be prosecuted, but the sale of the entire business in September of 1975 (62a) raises the question as to whether any new action may validly be instituted anywhere.

The case of Costello v. United States, supra, after
stating the above went on to state (365 U.S. 285):

"*If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.' See also House v. Mullen (US) 22 Wall 42, 46, 22 L ed 838, 839; Swift v. Mc Pherson, 232 US 51, 56, 58 L ed 499, 503, 34 S Ct 239; St. Romes v. Levee Steam Cotton Press Co. 127 US 614, 619, 32 L ed 289, 291, 8 S Ct 1335; Burgett v. United States (CA7 III) 80 F2d 151, 104 ALR 167; Gardner v. United States (CA9 Cal) 71 F2d 63.

We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition'." (Emphasis added.)

In the case of a non-U.S. flag vessel, it is necessary as a "pre-condition" that "substantial" connecting factors with the United States be shown to establish a claim under the Jones Act. In the language of Costello, supra, plaintiff failed to establish a necessary "pre-condition".

The court below also cited Vassos v. Societa Trans-oceanica Canopus, 272 F.2d 182, a per curiam decision of this court, but the citation is obviously distinguishable. There the previous case had been dismissed by reason of the statute of limitations, in addition to a holding of

forum non conveniens. No new facts were shown, and the statute of limitations holding was sufficient of itself to require affirmance.

Now that plaintiff claims to have established the necessary elements of the pre-condition, he is entitled to a determination that he has or has not, free of a consideration of forum non conveniens.

POINT II

JUDGE MC LEAN'S DETERMINATION WAS A DETERMINATION OF FACT "INCIDENT TO A DETERMINATION OF LACK OF JURISDICTION", AND AS SUCH NOT A SUBJECT OF RES JUDICATA OR COLLATERAL ESTOPPEL.

While the strict language of Rule 41(b) as well as the common law of res judicata would seem to preclude the application of res judicata to the subject of jurisdiction, there are cases which outside of context state otherwise. A principal such case is Ripperberger v. A.C. Allyn & Co., 113 F.2d 332, a decision of this circuit. In context it does not state a rule applicable to the facts herein wherein new material satisfying the alleged previous deficiency has been presented.

Thus in the very Ripperberger case, on its remand to the district court, Judge GODDARD wrote (Ripperberger v. A.C. Allyn & Co., 37 F.Supp. 373) at page 374:

"[4,5] While a dismissal of an action on the sole ground that the court has no jurisdiction of the subject matter or of the parties is a conclusive determination of the fact that the court lacks jurisdiction, it is not an adjudication of the merits and will not bar another action in the proper tribunal for the same cause; nor will it bar a second suit where the pleader in the prior suit failed to allege some essential jurisdictional fact which later is supplied in a new pleading. It is quite true that if a suit be dismissed solely for lack of jurisdiction because there is no diversity of citizenship between plaintiff and defendant, that plaintiff may bring suit on the same cause of action in the same district if he subsequently becomes a citizen of another state so that diversity of citizenship then exists between plaintiff and defendant; and the dismissal of the first suit is not a bar to the second in the same court. But in such subsequent suit a different state of facts is presented which alters the situation and calls for a new determination by the court. Cf. Gilmer v. City of Grand Rapids, C.C., 16 F. 708." [Emphasis added.]

In a well considered opinion reviewing the authorities including those cited by Judge GRIESA, Judge MATHES stated in Williams v. Minnesota Mining & Mfg. Co., (S.D.Cal.) 14 F.R.D. 1 at pages 8-9:

"[14] The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision upon the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal. Southern Pacific Co. v. Bogert, 1919, 250 U.S. 483, 490, 39 S.Ct. 533, 63 L.Ed. 1099; Smith v. McNeal,

"1883, 109 U.S. 426, 429-430, 3 S.Ct. 319, 27 L.Ed. 986; Hughes v. United States, 1866, 4 Wall. 232, 71 U.S. 232, 237, 18 L.Ed 303; Walden v. Bodley, 1840, 14 Pet. 156, 39 U.S. 156, 161, 14 L.Ed. 398; Meyer v. Kansas City So. R. Co., 2 Cir., 1936, 84 F.2d 411, 415; Bunker-Hill & Sullivan Min. & C. Co. v. Shoshone Min. Co., 9 Cir., 1901, 109 F. 504, 507; cf. National Labor Relations Board v. Denver Bldg. Council, 1951, 341 U.S. 675, 681-683, 71 S. Ct. 943, 95 L.Ed. 1284; Sacks v. Stecker, 2 Cir., 1932, 62 F.2d 65, 67; Miller v. Standard Oil Co., D.C.N.D. Ill. 1952, 104 F.Supp. 946, 948; Ripperger v. A.C. Allyn & Co., D.C.S.D.N.Y. 1940, 37 F.Supp. 373, 374; see also Restatement, Judgments §§ 41(b), 49(a), 50(b), 51(b), 59(b), (1942); and for a case involving a prior dismissal based upon an issue of law, see Angel v. Bullington, 1947, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed 832; cf. Forsyth v. City of Hammond, 1897, 166 U.S. 506, 517-518, 17 S.Ct. 665, 41 L.Ed. 1095; Restatement, Judgments §§ 49 (b), 70 (1942).

[15] The same rule applies for like reasons to orders made prior to a determination of lack of jurisdiction. Such provisional or interlocutory adjudications are held not to be res judicata in a subsequent proceeding. Sachs v. Ohio Nat. Life Ins. Co., 7 Cir., 1945, 148 F.2d 128, 158 A.L.R. 688, certiorari denied, 1945, 326 U.S. 753, 66 S.Ct. 92, 90 L.Ed. 452; Restatement, Judgments §71 (1942).

So, also with respect to findings as to jurisdictional facts made incident to a determination of lack of jurisdiction. These are held not to be res judicata so as to estop a party to assert the contrary in a collateral proceeding, since the collateral estoppel doctrine is not applicable to such "incidental" determinations of fact. Restatement, Judgments §71 (1942); Scott, Collateral Estoppel by Judgment, 56 Harv. L.Rev. 1, 18-22"

"(1942); See City of Hammond v. Schappi Bus Line, 1927, 275 U.S. 164, 172, 48 S.Ct. 66, 72 L.Ed. 218; East Coast Lumber Terminal v. Town of Babylon, 2 Cir., 1949, 174 F.2d 106, 112, 8 A.L.R.2d 1219; see also Commissioner v. Sunnen, 1949, 333 U.S. 591, 601-602, 68 S.Ct. 715, 92 L.Ed. 898; Restatement, Conflicts § 614, Illustrations 1 and 2 (1934); cf. Stoll v. Gottlieb, 1938, 305 U.S. 165, 171-177, 50 S.Ct. 134, 83 L.Ed. 104; Baldwin v. Iowa State Travelling Men's Ass'n, 1931, 283 U.S. 522, 524-526, 51 S.Ct. 517, 75 L.Ed. 737; Chicago Life Ins. Co. v. Cherry, 1917, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966. Contra: Simmons v. Superior Court, 1950, 96 Cal. App.2d 119, 125, 214 P.2d 844, 849, 19 A.L.R.2d 288; cf. Restatement, Judgments § 71(e) (1942)."
[Emphasis added.]

For the purposes of the within case, it is clear that the previous decision of Judge Mc LEAN is not res judicata whether the case be regarded as one of new material and therefore a different situation or as a new determination on new material of a question of fact "collateral to the determination of jurisdiction".

POINT III

THE LAW IS NOW RECOGNIZED TO BE DIFFERENT THAN IT WAS WHEN THIS CASE WAS CONSIDERED BY JUDGE MC LEAN AND THE COURT OF APPEALS.

To add the additional argument now made is perhaps to carry coals to Newcastle. But res judicata is at least in theory intended to be an instrument of justice, Rogers v. Guaranty Trust Co., 288 U.S. 123, 151, and it is most respectfully submitted that to deny the plaintiff one opportunity to assert his claim pursuant to the Jones

Act, would under the circumstances here present amount to a consummate injustice.

In the case of Commissioner of Internal Revenue, Petitioner, v. Joseph Sunnen, 333 U.S. 591, the Supreme Court stated at page 600:

". . . . A judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable."

Such is the case here.

At the time of this case before Judge Mc LEAN and this Court, it was thought to be the law that there was a discretionary jurisdiction in the court to accept or decline jurisdiction. As now appears from Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 and Moncada v. Lemuria Shipping Corp., 491 F.2d 470, in the presence of "substantial" or pre-condition factors, jurisdiction is mandatory. In the absence of such factors the case is dismissable (not declinable) for failure to make out a case. Reference to the legal history of these doctrines is in order.

A Jones Act case is of course merely an FELA case transported to a maritime application. In the case of O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 193 F.2d 348 the Court of Appeals stated:

"It is plain, of course, that Congress conferred jurisdiction both upon the Federal and State Courts to entertain suits for the vindication of rights established by the Federal Act, but it is also plain from the authorities cited and discussed that Congress did not by use of the word 'concurrent' make jurisdiction of either dependent upon the other. The jurisdiction of the Federal courts is mandatory in the sense that such a court is without discretion to disclaim it where a plaintiff has brought himself within the terms of the Federal Act. On the other hand, the jurisdiction of a State Court may be embraced or rejected, it is permissive in nature, depending upon the law of the State, providing of course that such law rests upon a non-discriminatory basis."

To the same effect, this Court in Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, stated at page 443:

"Moreover, this is not a matter resting in the discretion of the trial judge, as seems to have been thought to be the case here. The facts either warrant the application of the Jones Act or they do not. Under 27 U.S.C.A. §1331, once Federal law is found applicable, the Court's power to adjudicate must be exercised. While at times the impact of intricate questions of state law may require a Federal Court to stay its hand, Burford v. Sun Oil Co., 1943, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424, and we need not attempt to catalogue other exceptional situations, it is clear that the District Court in the instant case had no discretionary power to refuse to adjudicate the case." [Emphasis added.]

However, in 1965 this Court, in a case called Tjonaman v. A/S Glittre, 340 F.2d 290 affirmed a declination of jurisdiction, indicating that Bartholomew was apparently not the

law, stating at page 292:

"Since the Bartholomew decision, the Supreme Court has reemphasized the paramount importance of the law of the flag. *McCulloch v. Sociedad National*, 372 U.S. 10, 83 S.Ct. 671 9 L.Ed.2d 547 (1963). This leaves no doubt that the starting point for weighing and evaluating of factors is consideration of that law. The Court said in *Lauritzen*, 'perhaps the most venerable and universal rule of Maritime law relevant to our problem is that which gives cardinal importance to the law of the flag'.

The ultimate issue, then, is whether the substantiality of other existing factors establishing a connection with the United States is sufficient to outweigh the 'venerable and universal rule'."

Tjonaman was followed in 1966 by this Court's decision in Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426. Again, the Court of Appeals for this Circuit felt that Tjonaman had departed in principle from Bartholomew and stated with respect to this subject at page 429 as follows:

"Wherever, as here, there are various factors to be weighed for and against jurisdiction, the decision must be controlled by the more weighty. This Court in its recent *Tjonaman* decision, *supra*, faced a similar problem and resolved against jurisdiction in our Courts."

Thereafter, certiorari to the Supreme Court was granted in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 because of the disparate holdings of the 5th Circuit in that case and the 2nd Circuit in Tsakonites. The Supreme Court, in

Rhoditis, overruled Tsakonites, and thereafter Tsakonites applied to the district court to reopen his case. In granting his application Judge LASKER stated (322 F.Supp. 722) at page 723:

"Plaintiff claims that is is clear, as it certainly seems to be from the fact of the Supreme Court's opinion, that the Supreme Court has overruled the rationale on which the instant case was originally dismissed by Judge Cooper, who was then affirmed by the Court of Appeals for this circuit. He contends that he should now be entitled to his day in court to establish that his case falls within the Rhoditis doctrine."

Ultimately the Tsakonites case was tried to a jury, a recovery had and the judgment paid.

In Moncada v. Lemuria Shipping Co., Inc., supra, this Court followed Rhoditis and returned to Bartholomew. Garis however came up in the Tjonaman and pre-Rhoditis-Tsakonites period with the result that his case went as one of jurisdiction declined instead of one in which it was decided that he had or did not have (even on the facts available) an absolute right to trial before the court.

If justice is not to be arbitrarily dispensed it is respectfully submitted that the rationale of Commissioner v. Sunner, 333 U.S. 591 is applicable.

CONCLUSION

THE CASE SHOULD BE REMANDED TO THE DISTRICT
COURT FOR FURTHER PROCEEDINGS.

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STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of May 1976 deponent served the within Brief upon:

Pellegrino & Giuffra, Esqs.

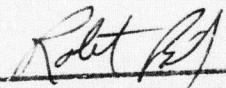
attorney(s) for

Appellee

in this action, at

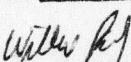
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the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.



Robert Bailey

Sworn to before me, this 28
day of May 1976.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1970